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IMMUNITY *RATIONE PERSONAE* OF FOREIGN GOVERNMENT OFFICIALS AND OTHER TOPICS:
THE SIXTY-FIFTH SESSION OF THE INTERNATIONAL LAW COMMISSION

108 *American Journal of International Law* (forthcoming 2014)

By Sean D. Murphy*

The International Law Commission held its sixty-fifth session in Geneva from May 6 to June 7 and from July 8 to August 9, 2013, under the chairmanship of Bernd H. Niehaus (Costa Rica).¹ The Commission devoted most of the sixty-fifth session to discussing three topics: immunity of state officials from foreign criminal jurisdiction; subsequent agreements and subsequent practice in relation to the interpretation of treaties; and protection of persons in the event of disasters. Notably, the Commission adopted three draft articles and commentary identifying three senior governmental officials as entitled to immunity *ratione personae* from foreign criminal jurisdiction – heads of state, heads of government, and foreign ministers – for their public or private acts, an immunity that ceases once they leave office.

Work also continued on four other topics already on the Commission's current program of work (identification of customary international law, provisional application of treaties, the obligation to extradite or prosecute, and the most-favored-nation clause), while new topics on protection of the environment in relation to armed conflicts and on protection of the atmosphere

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¹ Report of the International Law Commission on the Work of Its Sixty-Fifth Session, U.N. GAOR, 68th Sess., Supp. No. 10, at 2, para. 4 (2013) [hereinafter 2013 Report].

were added to the program. At the prior (sixty-fourth) session, the Commission had adopted thirty-two draft articles, together with commentaries, on the topic of expulsion of aliens, and is awaiting the comments and observations of governments on those draft articles to be submitted by 2014.² Therefore, that topic was not addressed at the sixty-fifth session.

I. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

During its sixty-fifth session, the Commission continued³ its consideration of the immunity of state officials from foreign criminal jurisdiction by discussing the second report of the special rapporteur, Concepción Escobar Hernández (Spain).⁴ The special rapporteur has indicated that “owing to the difficult and sensitive nature of the topic, it seems more appropriate to begin with *lex lata* considerations and, at a later date, to consider whether it is necessary and possible to formulate proposals *de lege ferenda*.”⁵ Further, she intends to maintain the distinction between immunity *ratione personae* (status-based immunity) and immunity *ratione materiae* (functional immunity).⁶

The second report proposed six draft articles, which were reworked and consolidated in the course of the sixty-fifth session, resulting in the preliminary adoption of three draft articles.

Draft article 1 indicates the intended scope of the draft articles as follows:

² See Report of the International Law Commission on the Work of Its Sixty-Fourth Session, U.N. GAOR, 67th Sess., Supp. No. 10, at 11–83, paras. 45–46 (2012) [hereinafter 2012 Report]; see also Sean D. Murphy, *The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission*, 107 AM. J. INT’L L. 164, 164–68 (2013).

³ For its prior work, see Murphy, *supra* note 2, at 169–71.

⁴ International Law Commission, Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/661 (Apr. 4, 2013) (prepared by special rapporteur Concepción Escobar Hernández) [hereinafter Second Report on Immunities].

⁵ *Id.* at 3, para. 7.

⁶ *Id.* at 15–17, paras. 47–53.

Article 1: Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.⁷

The term “officials” at some point will require clarification, as there is a wide range of persons who might be considered officials of a state;⁸ consequently a footnote was placed next to that word as a placeholder. The phrase “from the criminal jurisdiction of another State” signals that the draft articles do not address the immunity of state officials either from their own state’s criminal jurisdiction or from the criminal jurisdiction of international courts.⁹ While the draft articles address immunity from criminal jurisdiction, they do not yet define what is meant by “criminal jurisdiction.” The general understanding, however, is that such jurisdiction “should be understood as meaning the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context.”¹⁰ The Commission is not expected to address any requirements or limitations arising under international law with respect to such jurisdiction; hence, a lack of immunity by itself will not mean that a State is required to exercise criminal

⁷ 2013 Report, *supra* note 1, at 52, para. 49 (footnote excluded).

⁸ *Id.* at 53–54, para. 49.

⁹ *Id.* at 54, para. 49.

¹⁰ *Id.*

jurisdiction. Further, it seems likely that the draft articles will not preclude a state from according greater immunity than the articles require, just as regimes on sovereign immunity set a baseline of immunity that must be accorded without prejudice to the provision of greater immunities under national law.¹¹

Paragraph 2 of draft article 1 leaves untouched by these draft articles specialized immunity regimes, including immunities granted to special missions and to military forces and their civilian component. To ensure preservation of the full range of immunities accorded under such regimes, paragraph 2 contains a sweeping reference to “special rules” (thereby recognizing rules arising by treaty or custom), followed by a non-exclusive listing of regimes. Further, the broad reference to “persons connected with” those regimes is intended to acknowledge that a range of persons (including family members) may fall within the scope of such regimes.¹²

The special rapporteur proposed a draft article containing definitions for “criminal jurisdiction”, “immunity from foreign criminal jurisdiction”, “immunity *ratione personae*”, and “immunity *ratione materiae*.”¹³ Several members questioned the need for defining “criminal jurisdiction,” given that other regimes addressing immunity saw no need to do so in their definitions, including the Vienna conventions on diplomatic and consular relations.¹⁴ Other members saw utility in a definition, so as to clarify whether certain types of governmental action constitute an exercise of criminal jurisdiction. For example, does the “criminal jurisdiction” of a state include an order from that state compelling testimony in a criminal proceeding by a foreign official who is not a party in the case? Although it may not happen often, state officials can be

¹¹ See, e.g., U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter Convention on Jurisdictional Immunities of States].

¹² 2013 Report, *supra* note 1, at 55–58, para. 49.

¹³ Second Report on Immunities, *supra* note 4, at 11–17, paras. 36–53.

¹⁴ See Vienna Convention on Diplomatic Relations art. 1, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Consular Relations art. 1, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

ordered by courts to testify in criminal proceedings, as arose in *Certain Questions of Mutual Assistance in Criminal Matters*, where a French court had issued a summons to the Djiboutian head of state and senior Djiboutian officials. In that instance, the French court's summons with respect to the head of state was merely an invitation to testify, which the president of Djibouti could "freely accept or decline", and therefore the Court found that the summons did not transgress the Djiboutian head of state's immunity.¹⁵ The implication, however, was that if the summons had been compulsory, then head of state immunity would have been at issue, even though the state official was not a defendant in the case. Other possible definitions also encountered difficulty within the Commission; for example, members were unsure of the utility of defining "immunity *ratione personae*," insofar as the operative draft articles themselves would clarify what is meant by the term, and any discrepancy between a definition and the substantive articles could lead to confusion. Ultimately, the drafting committee decided not to send back to the plenary a revised draft article on definitions until further along in the project.

Draft article 3 commences the treatment of immunity *ratione personae* and addresses which officials should receive such immunity. It reads:

Article 3: Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.¹⁶

¹⁵ *Certain Questions of Mutual Assistance in Criminal Matters* (Djib. v. Fr.), 2008 I.C.J. REP. 177, para. 171 (June 4).

¹⁶ 2013 Report, *supra* note 1, at 58, para. 49.

In crafting this provision, the Commission essentially considered three options: recognizing such immunity for just the head of state and probably the head of government; recognizing such immunity for the so-called “troika” (head of state, head of government and minister for foreign affairs); and recognizing such immunity for a range of senior government officials, including the troika.¹⁷

The first option had the benefit of aligning the immunity closely to individuals who personify the state itself, from which the immunity flows. Nevertheless, the option had very little support within the Commission. Instead, most members asserted that the immunity extended to foreign ministers as well, principally for two reasons: recognition of the important status of the foreign minister in relevant international instruments; and the prior provision of such immunity to foreign ministers by international courts and tribunals when cases arose.¹⁸ With respect to international instruments, recognition that a foreign minister’s representative functions approximate those of the head of state may be seen in instruments such as the Vienna Convention on the Law of Treaties,¹⁹ the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,²⁰ the Convention on Special Missions,²¹ the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,²² and, perhaps implicitly, in the United

¹⁷ *Id.* at 58–65, para. 49.

¹⁸ *Id.* at 60–62, para. 49.

¹⁹ Vienna Convention on the Law of Treaties art. 7(2)(a), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (hereinafter VCLT).

²⁰ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 1.1(a), Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

²¹ Convention on Special Missions art. 21, Dec. 8, 1969, 1400 U.N.T.S. 231.

²² Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character art. 50, Mar. 14, 1975, U.N. Doc. A/CONF.67/16 (1975).

Nations Convention on Jurisdictional Immunities of States and Their Property.²³ Indeed, “it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions.”²⁴ Inclusion of foreign ministers in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons is notable in that, when the Commission drafted that convention, it chose not to include the minister for foreign affairs in the list of persons internationally protected, but governments decided to add that official to the final text of the Convention.²⁵

As for case law, many Commission members noted that the International Court, in the *Arrest Warrant* case, asserted that “it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”²⁶ Indeed, the immunity of a sitting foreign minister from foreign criminal jurisdiction was precisely the issue in that case. As for national courts, in its commentary the Commission stated:

that while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on

²³ Convention on Jurisdictional Immunities of States arts. 3.2, 2.1(a)(iv), *supra* note 11 (art. 3.2 addressing heads of state and art. 2.1(a)(iv) arguably including the other two categories of officials within the concept of “representatives of the State”).

²⁴ Armed Activities on the Territory of the Congo (New application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. REP. 6, , para. 46 (Feb. 3).

²⁵ See 2013 Report, *supra* note 1, at 60–61, para. 49.

²⁶ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. REP. 3, para. 51 (Feb. 14); *see also* Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 14, para. 170.

this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their term of office.²⁷

Though the Commission did not cite academic commentary in support of this proposition, it appears that many scholars take the position that immunity *ratione personae* extends to the troika.²⁸

The more difficult question was whether the immunity should extend beyond the troika to other senior government officials. In this regard, the *Arrest Warrant* judgment suggested a broader ambit than just the troika, for the language quoted above pointed to “certain holders of high-ranking office in a State, such as” the troika.²⁹ Under the influence of that statement, some scholars have maintained that immunity *ratione personae* extends beyond the troika.³⁰ Yet given that the only official at issue in the *Arrest Warrant* case was a foreign minister, any language suggesting a broader ambit was *dicta*. In national courts, there is no conclusive outcome; some courts have accorded immunity *ratione personae* to other government officials, while some courts have not. In some instances, the basis for the court’s decision, one way or the other, is unclear or ambiguous; a denial of immunity might be because the official falls outside the troika or might be because he or she falls outside the circle of “high-ranking” officials.

²⁷ 2013 Report, *supra* note 1, at 62, para. 49.

²⁸ See, e.g., Rémy Prouvèze, *Immunities*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 355, 360 (William Schabas & Nadia Bernaz eds., 2011); ANNYSSA BELAL, IMMUNITÉS ET VIOLATIONS GRAVES DES DROITS HUMAINS: VERS UNE ÉVOLUTION STRUCTURELLE DE L’ORDRE JURIDIQUE INTERNATIONAL? 155–157 (2011); ALVARO BORGHI, L’IMMUNITÉ DES DIRIGEANTS POLITIQUES EN DROIT INTERNATIONAL 541 (2003).

²⁹ See *Arrest Warrant* of 11 April 2000, *supra* note 26, at 20–21, para. 51.

³⁰ See, e.g., PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 73–75 (2013); JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 500 (8th ed. 2012); Chanaka Wickremasinghe, *Immunities Enjoyed By Officials of States and International Organizations*, in INTERNATIONAL LAW 380, 401 (Malcom D. Evans ed., 3d ed. 2010); ROBERT KOLB, DROIT INTERNATIONAL PÉNAL 202–203 (2008); Paolo Palchetti, *Some Remarks on the Scope of Immunity of Foreign State Officials in the Light of Recent Judgments of Italian Courts*, 19 ITALIAN Y.B. INT’L L. 83, 85 (2009).

For example, a U.K. court in 2004 held that the Israeli defense minister was entitled to immunity *ratione personae* with respect to an arrest warrant stemming from allegations of committing grave breaches of the Fourth Geneva Convention. The judge expressly stated: “today I conclude that a Defence Minister would automatically acquire State immunity in the same way as that pertaining to a Foreign Minister.”³¹ In the 2011 *Khurts Bat* case, a U.K. court declined to extend personal immunity to the head of the executive office of Mongolia’s national security council, who was sought for extradition on charges of committing abduction and serious bodily injury. The court declined to do so not because the official fell outside of the troika but, because of his insufficiently high rank, he fell outside of a circle of officials who are able to avail themselves of immunity *ratione personae*.³² U.S. courts have not addressed the issue in the criminal context, but in civil cases have declined to extend immunity *ratione personae* in 1987 to the Philippines’ solicitor general,³³ in 2003 to Pakistan’s minister of agriculture,³⁴ and in 2013 to certain Cameroonian officials other than Cameroon’s President, including the “Secretary of State for the Defense in charge of National Gendarmerie.”³⁵

After reviewing such cases, and noting that senior government officials in any event can benefit from special missions immunity when they are on official visits,³⁶ the Commission ultimately elected to restrict immunity *ratione personae* to the troika. At some point the Commission may need to consider whether family members or other persons within the “entourage” of a troika official are also protected by the immunity, on a theory that their

³¹ *Re Mofaz*, [2004] 128 I.L.R. 709, 712 (Eng.).

³² *Khurts Bat v. Investigating Judge of the German Federal Court*, [2011] EWHC (Admin) 2029 [61] (Eng.).

³³ *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797–98 (N.D. Cal. 1987).

³⁴ *I.T. Consultants, Inc. v. Republic of Pakistan*, 351 F.3d 1184, 1191–92 (D.C. Cir. 2003).

³⁵ *Fotso v. Republic of Cameroon*, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 25424, at *3–6 (D. Oregon Jan. 25, 2013) (extending immunity *ratione personae* to the president based on a suggestion of immunity from the U.S. government); *Fotso v. Republic of Cameroon*, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 83948, at *3, 16–21 (D. Oregon May 16, 2013) (extending immunity *ratione materiae* to the other defendants).

³⁶ 2013 Report, *supra* note 1, at 65.

protection is also needed to achieve the object and purpose of the immunity. The memorandum prepared by the Commission's Secretariat in 2008 discussed this issue, pointing to several national statutes where family members and others were granted immunity *ratione personae* as well.³⁷ In the United States there is precedent for such immunity in the civil context; a U.S. court in a civil suit in 1988 extended immunity *ratione personae* to the wife of the president of Mexico, by virtue of her relationship to Mexico's president.³⁸

Draft article 4 addresses the temporal scope of immunity *ratione personae* and whether it relates to both official and private acts. The general view within the Commission was the immunity only exists while the person holds the office of head of state, head of government, or foreign minister, but protects the person with respect to both their private or official acts and omissions. The draft article as adopted on first reading reads:

Article 4: Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

³⁷ International Law Commission, Memorandum by the Secretariat on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/596, at 74–79, paras. 114–117, 121 (Mar. 31, 2008).

³⁸ *Kline v. Kaneko*, 535 N.Y.S.2d 303, 304–05 (N.Y. Sup. Ct. N.Y. Cnty. 1988).

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.³⁹

Though in most instances the temporal requirement will be clear, the draft article and commentary do not address certain issues, such as the effect upon existing proceedings of a person who transitions into or out of a high-level office. Thus, if a person is indicted and an arrest warrant is issued before she becomes president, is she immune from such proceedings after she becomes president? Conversely, if a person is indicted and an arrest warrant is issued while she is president, and the proceeding is stayed, does she remain immune from that indictment after she leaves office? In the *Arrest Warrant* case, the International Court ordered Belgium to cancel the arrest warrant that it issued during the time the foreign minister was in office, even though at the time of the Court's order that person was no longer foreign minister.⁴⁰ The Court's position was that the issuance of the warrant constituted a violation of Belgium's obligation towards the D.R.C. and remained so even after the minister left office.

Thus, the Commission provisionally adopted three draft articles and agreed to consider the draft article on definitions on a rolling basis. The Commission will await the special rapporteur's subsequent reports, in which she will explore immunity *ratione materiae*, possible exceptions to immunity, and procedural matters, with associated draft articles. To that end, the Commission has requested information from States "on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases 'official acts'

³⁹ 2013 Report, *supra* note 1, at 66, para. 49.

⁴⁰ Arrest Warrant of 11 April 2000, *supra* note 26, para. 76.

and ‘acts performed in an official capacity’ in the context of the immunity of State officials from foreign criminal jurisdiction.”⁴¹

The issue of exceptions may prove contentious. One exception clearly exists; either immunity *ratione personae* or *ratione materiae* may be waived for a given case by the government of the official.⁴² Whether further exceptions will be accepted by the Commission is unclear, as is whether, if they are accepted, they will be regarded as progressive development of the law. The overall objective to avoid impunity for atrocity crimes is apparent, but so is the desire to allow for the peaceful conduct of international relations between senior governmental officials and to avoid spurious allegations before national courts driven more by politics than facts. The *Arrest Warrant* judgment found that customary international law provided immunity before national courts for a sitting foreign minister—and *a fortiori* for heads of state and government—even with respect to alleged war crimes and crimes against humanity.⁴³ Other international jurisprudence may prove relevant as well, such as the International Criminal Court’s 2011 decision regarding Malawi’s failure to arrest and surrender Sudan’s President. The relevant portion of that decision indicates that immunity *ratione personae* under customary law fully operates within national law with respect to national prosecutions, even in the context of serious international crimes.⁴⁴ Likewise, in the *Charles Taylor* case, the Appeals Chamber of the Special Court of Sierra Leone made the same distinction between the non-availability of immunity from prosecution before international courts and its availability with respect to

⁴¹ 2013 Report, *supra* note 1, at 8, para. 25.

⁴² Arrest Warrant of 11 April 2000, *supra* note 26, para. 61.

⁴³ *Id.* at para. 58.

⁴⁴ Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. CC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, paras. 22–43 (Dec. 12, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf> (affirming that immunity *ratione personae* exists with respect to prosecution for serious crimes in national courts, as contrasted with its unavailability with respect to arrest and surrender of a person suspected of such crimes to an international criminal tribunal).

prosecution before national courts.⁴⁵ In several cases before national courts, including that involving former Chilean president Augusto Pinochet,⁴⁶ the lack of immunity turned not on the nature of the crime, but on other issues, such as the existence of a multilateral treaty adhered to by the relevant states with respect to the relevant atrocity.

II. OTHER TOPICS

Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties

Previously addressed by an ILC study group under the broader designation “treaties over time,” this topic was refined and renamed in 2012 and assigned to Georg Nolte (Germany) as special rapporteur.⁴⁷ Nolte submitted his first report on this topic for the sixty-fifth session,⁴⁸ which led to the provisional adoption by the Commission of five draft conclusions.

Draft conclusion 1 situates the topic within the rules on treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).⁴⁹ It reads:

Conclusion 1: General rule and means of treaty interpretation

⁴⁵ Prosecutor v. Charles Ghankay Taylor, Case Number SCSL-2003-01-AR72(E), Decision on Immunity from Jurisdiction, paras 51-52 (Special Court for Sierra Leone, Appeals Chamber May 31, 2004).

⁴⁶ Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, [1999] UKHL 17, [2000] AC 147 (appeal taken from Eng.), *reprinted in* 38 I.L.M. 581 (1999).

⁴⁷ See Murphy, *supra* note 2, at 176.

⁴⁸ International Law Commission, First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, U.N. Doc. A/CN.4/660, at 4–5, para. 6 (2013) (prepared by special rapporteur Georg Nolte) [hereinafter First Report on Subsequent Agreements and Subsequent Practice].

⁴⁹ See VCLT, *supra* note 19.

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.
2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.
5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.⁵⁰

Notably, paragraph 1 confirms the status of Articles 31 and 32 as customary international law, but does not address whether Article 33 (on interpretation of treaties authenticated in more than one language), in whole or in part, also reflects customary international law. Mixed views

⁵⁰ 2013 Report, *supra* note 1, at 13, para. 39.

emerged within the Commission regarding the status of provisions set forth in Article 33, including whether addressing the matter was pertinent to this particular topic. Paragraphs 1, 3, and 4 stress the difference between Articles 31 and 32; subsequent practice and agreement falling within Article 31 “shall be taken into account,” while all other subsequent practice may fall within the supplementary means of interpretation to which “recourse may be had” under Article 32. That distinction also animates draft conclusion 2, which reads:

Conclusion 2: Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31 (3) (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.⁵¹

The term “authentic means of interpretation” does not appear in Article 31 of the Vienna Convention, but was used by the Commission in 1966 to characterize the means identified in Article 31.⁵² Though the distinction between Articles 31 and 32 exists, the Commission also stressed in paragraph 5 of conclusion 1 that the interpretation of a treaty consists of “a single combined operation” – a phrase also used by the Commission in 1966 when discussing these rules.⁵³

⁵¹ 2013 Report, *supra* note 1, at 20, para. 39.

⁵² [1966] 2 Y.B. Int’l L. Comm’n 187, 218–23, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1966) [hereinafter 1966 Draft Articles].

⁵³ *Id.* at 219.

In some circumstances, a treaty contains an open-textured term, such as “commercial,”⁵⁴ which might be understood to encompass different meanings over time. In such circumstances, the subsequent agreement and subsequent practice of states may be especially helpful in understanding the meaning to be given the term. The special rapporteur wished to identify this particular use of subsequent agreement and subsequent practice, and thus draft conclusion 3 reads:

Conclusion 3: Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.⁵⁵

The commentary makes clear that there is no *a priori* assumption of a term as either evolving or not; in any given instance, it may be that subsequent agreement or practice helps establish that the term is static rather than evolving.⁵⁶ Ultimately, this particular conclusion might be better situated further along in the list of conclusions since broader, systemic issues are addressed in draft conclusions 4 and 5.

Draft conclusion 4 defines what is meant by subsequent agreement and subsequent practice as follows:

⁵⁴ See *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment, 2009 I.C.J. 213, para. 66 (July 13).

⁵⁵ 2013 Report, *supra* note 1, at 24, para. 39.

⁵⁶ *Id.* at 25, para. 39.

Conclusion 4: Definition of subsequent agreement and subsequent practice

1. A “subsequent agreement” as an authentic means of interpretation under article 31 (3) (a) is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A “subsequent practice” as an authentic means of interpretation under article 31 (3)(b) consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Paragraphs 1 and 2 are lifted almost verbatim from Article 31(3); the added references to “after the conclusion of a treaty” indicate that the relevant practice/agreement may date from the time the text of a treaty is adopted or made definite.⁵⁷ The language of paragraph 3 is not based on the VCLT because subsequent practice is not specifically mentioned as a supplementary means of interpretation. Nevertheless, the commentary identifies numerous cases before international tribunals and courts where subsequent practice not falling within Article 31(3)(b) was used in the process of treaty interpretation.⁵⁸

⁵⁷ *Id.* at 31, para. 39.

⁵⁸ *Id.* at 37–41, para. 39.

Draft conclusion 5 focuses on the issue of attribution of conduct to a state when analyzing subsequent agreement and practice. It reads:

Conclusion 5: Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.⁵⁹

The debate within the Commission on the fifth conclusion encompassed divergent views; some members believed there needed to be a different definition for “attribution” in the treaty interpretation context; others saw no discrepancy between this context and that of state responsibility; still others questioned the wisdom and necessity of addressing attribution at all. The language eventually adopted is meant to indicate that all subsequent conduct attributable under the rules of state responsibility is potentially relevant to treaty interpretation; hence, “may” consist of any conduct.⁶⁰ A paragraph following the present first paragraph—eventually removed—would have differentiated between the practice of “higher” State organs and “lower”

⁵⁹ *Id.* at 41, para. 39.

⁶⁰ *Id.* at 42, para. 39.

State organs, but such a distinction was regarded as problematic since the conduct of lower authorities may in certain circumstances be relevant.⁶¹

The special rapporteur plans to submit a second report in 2014, a third report in 2015, and a final report, with revised conclusions and commentaries, in 2016.⁶²

Protection of Persons in the Event of Disasters

The Commission is close to completing its first reading on this topic, which consists of a series of draft articles setting forth rules applicable to a state in which a disaster occurs and to those states or non-state actors that are in a position to provide assistance. “Disaster” for this purpose is defined in draft article 3 as a “calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”.⁶³

As of 2012, eleven draft articles had been adopted on this topic, addressing matters such as the duty and forms of cooperation and offers of assistance.⁶⁴ At the very start of the sixty-fifth session, the Commission adopted five further draft articles on this topic, draft articles 12 through 15 and 5*bis*, which had been presented, discussed, and re-drafted but not adopted during the sixty-fourth session.⁶⁵ These draft articles further developed the rules governing external assistance, which were introduced in draft articles 10 and 11, addressing respectively the duty of a state to seek assistance when faced with a disaster that exceeds the state’s national response capacity and affirming that the affected state’s consent is required before the provision of

⁶¹ *Id.* at 42–43, para. 39.

⁶² First Report on Subsequent Agreements and Subsequent Practice, *supra* note 48, at 56, para. 145.

⁶³ 2013 Report, *supra* note 1, at 73, para. 61.

⁶⁴ See Murphy, *supra* note 2, at 168–69.

⁶⁵ 2013 Report, *supra* note 1, at 73, para. 59.

external assistance.⁶⁶ Draft article 12 provides that states, the United Nations, other intergovernmental organizations, and relevant non-governmental organizations “have the right to offer assistance to the affected states”, while relevant non-governmental organizations “may also offer assistance”.⁶⁷ Draft article 13 recognizes that the affected state may impose conditions on the provision of external assistance, but only in accordance with the draft articles, international law, and the national law of the affected State.⁶⁸ Draft article 14 indicates that the affected state shall facilitate the prompt, effective provision of external assistance by taking necessary measures within its national laws.⁶⁹ Draft article 15 addresses the termination of external assistance, requiring appropriate advance notification.⁷⁰ Lastly, draft article 5 *bis* further elaborates the principle of cooperation introduced in draft article 5 by providing examples of the types of activities that are to be included in “cooperation”, specifically “humanitarian assistance, coordination of international relief actions and communications, and making available relief equipment and supplies, and scientific medical and technical resources.”⁷¹

Following the adoption of these five draft articles, the Commission turned to the sixth report of the special rapporteur, Eduardo Valencia-Ospina (Colombia), which focused on the responsibility of states to reduce the risk of disasters.⁷² After discussion in both the plenary and the drafting committee, the Commission adopted draft article 16, which provides:

Article 16: Duty to reduce the risk of disasters

⁶⁶ *Id.* at 74, para. 61.

⁶⁷ *Id.* at 79, para. 62.

⁶⁸ *Id.* at 80, para. 62.

⁶⁹ *Id.* at 83, para. 62.

⁷⁰ *Id.* at 85, para. 62.

⁷¹ *Id.* at 76, para. 62.

⁷² International Law Commission, Sixth Report on the Protection of Persons in the Event of Disasters, U.N. Doc. A/CN.4/662, (May 3, 2013) (prepared by special rapporteur Eduardo Valencia-Ospina) [hereinafter Sixth Report on the Protection of Persons in the Event of Disasters].

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.⁷³

The obligation identified is to “reduce” rather than “prevent” disasters, and is to be accomplished through measures that seek to prevent, mitigate, and prepare.⁷⁴ The Commission relied on a variety of sources of law in order to identify this duty to reduce the risk of disasters, including international agreements and instruments (such as the 2005 Hyogo Framework for Action),⁷⁵ regional court decisions (such as the European Court of Human Rights decisions in *Öneryildiz v. Turkey* and *Budayeva and Others v. Russia*),⁷⁶ and numerous national laws on prevention, preparation, and mitigation.⁷⁷ As indicated in the commentary thereto, the Commission sought to emphasize that while states have a concrete obligation to reduce the risk of disasters, the dimensions of this obligation are different for each state, in particular due to resource constraints and legislative or regulatory structure.⁷⁸ A further draft Article 5 *ter* extends

⁷³ 2013 Report, *supra* note 1, at 75, para. 61.

⁷⁴ *Id.* at 89, para. 62.

⁷⁵ *Id.* at 86-87, para. 62.

⁷⁶ *Id.* at 87, para. 62.

⁷⁷ *Id.* at 87-88, para. 62.

⁷⁸ *Id.* at 89-90, para. 62.

the principle of cooperation introduced in draft article 5 to include cooperation with respect to the reduction of disasters.⁷⁹

Identification of Customary International Law

This topic was added to the current program of work in 2012 and placed under the stewardship of Michael Wood (United Kingdom) as special rapporteur.⁸⁰ Wood's first report⁸¹ for the Commission's sixty-fifth session was introductory in nature, noting that the aim of the topic is to "offer some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases",⁸² which will require the Commission to "consider both the requirements for the formation of a rule of customary international law, and the types of evidence that establish the fulfilment of those requirements."⁸³ The report generally addressed customary international law as a source of international law, indicated the types of materials (notably ICJ cases) that would assist in analyzing the topic, and surveyed the ample literature on the topic.

Three decisions were taken by the Commission that bear mention. First, there was agreement within the Commission that Wood should proceed to develop "a set of conclusions with commentaries, a practical outcome which would serve as a guide to lawyers and judges who are not experts in public international law."⁸⁴ Second, the original title of the topic ("formation and evidence of customary international law") was changed to "identification of customary

⁷⁹ *Id.* at 78, para. 62.

⁸⁰ See Murphy, *supra* note 2, at 174.

⁸¹ International Law Commission, First Report on Formation and Evidence of Customary International Law, U.N. Doc. A/CN.4/663, at 3, para. 6 (2013) (prepared by special rapporteur Sir Michael Wood) [hereinafter First Report on Identification of Customary International Law].

⁸² *Id.* at 6, para. 14.

⁸³ *Id.* at 6–7, para. 15.

⁸⁴ 2013 Report, *supra* note 1, at 95, para. 73, and at 99, para. 101.

international law” in response to various concerns, including the difficulty of translating “evidence” in this context in different languages. Even so, it was agreed that “it remained important to include both the formation and evidence of customary international law within the topic.”⁸⁵ Third, the Commission was in general agreement that *jus cogens* would not be directly dealt with as a part of the topic, though the concept may be referenced as the need arose.⁸⁶

In 2014, Wood plans on submitting a second report that will examine the two elements of customary international law—state practice and *opinio juris*—and the relationship between them, as well as the effects of treaties on custom and the role played by international organizations. To that end, the Commission has requested information from states “on their practice relating to the formation of customary law and the types of evidence suitable for establishing such law in a given situation, as set out in: (a) official statements before legislatures, courts, and international organizations; and (b) decisions of national, regional and subregional courts.”⁸⁷ A third report in 2015 will address more specific aspects, such as the “persistent objector” rule, and “special” or “regional” customary international law. Wood hopes to submit a final report in 2016 containing a full set of conclusions and commentary for adoption by the Commission.⁸⁸

Provisional Application of Treaties

At the sixty-fourth session, the Commission added the topic “provisional application of treaties” to its current programme of work and appointed Juan Manuel Gómez-Robledo (Mexico)

⁸⁵ *Id.* at 95, para. 76; *see also id.* at 100, para. 106. In French, the title will be “La détermination du droit international coutumier”.

⁸⁶ *Id.* at 96, para. 78, and at 99, para. 103.

⁸⁷ 2013 Report, *supra* note 1, at 8.

⁸⁸ First Report on Identification of Customary International Law, *supra* note 81, at 76, para. 102.

as special rapporteur.⁸⁹ Gómez-Robledo submitted a short first report on the topic for the sixty-fifth session, which sought to identify on a general level “the principal legal issues that arise in the context of the provisional application of treaties”.⁹⁰ Certain language within the report prompted some members to express concern that the Commission not be seen as promoting the use of provisional application by states, given that doing so might circumvent established national legal procedures for adherence to treaties.⁹¹ Rather, the objective was to accept the phenomenon of the resort by states to provisional application and to examine its legal parameters. That concern prompted some members to suggest studying the national procedures of states, but it was generally understood that the project was concerned with the relevant rules of international law (not national law), including those set forth in VCLT Article 25. Several members identified the central value of the project as determining the legal effect of provisional application, which in their view gave rise to a binding legal obligation (through typically subject to a readily-available ability to terminate the obligation).⁹²

Gómez-Robledo has indicated a preference for developing a set of guidelines with commentaries as the outcome of the Commission’s work on the topic.⁹³ To assist in its work, the Commission has requested information from states on their practice concerning provisional application, especially with respect to the decision to apply a treaty provisionally, the termination of such provisional application, and the legal effects of provisional application.⁹⁴

Obligation to Extradite or Prosecute (aut dedere aut judicare)

⁸⁹ 2012 Report, *supra* note 2, at 105, paras. 140–41; *see* Murphy, *supra* note 2, at 171–73.

⁹⁰ International Law Commission, First Report on the Provisional Application of Treaties, U.N. Doc. A/CN.4/664, at 2, para. 1 (2013) (prepared by special rapporteur Juan Manuel Gómez-Robledo) [hereinafter First Report on Provisional Application].

⁹¹ 2013 Report, *supra* note 1, at 102–03, paras. 118–19.

⁹² *Id.* at 103, para. 121.

⁹³ *Id.* at 104, para. 129.

⁹⁴ 2013 Report, *supra* note 1, at 8, para. 27.

Launched in 2005, this topic for the past two years has been addressed within a working group under the chairmanship of Kriangsak Kittichaisaree (Thailand), rather than under the auspices of a special rapporteur.⁹⁵ During the sixty-fifth session, the working group produced a report that summarizes the Commission’s work to date, including the initial reports by a special rapporteur and a detailed memorandum by the secretariat on existing treaty regimes.⁹⁶ Among the findings of the report is that “it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute,”⁹⁷ but “that there are important gaps in the present conventional regime ... which may need to be closed”, including with respect to crimes against humanity.⁹⁸ The report also analyzed the International Court of Justice’s recent decision in the *Obligation to Extradite or Prosecute* case,⁹⁹ where the Court identified several important aspects of the *aut dedere aut judicare* provisions of the Convention against Torture¹⁰⁰—principles that likely have significance beyond just that treaty. Among other things, the Court’s decision addressed in some detail a state’s obligations to establish the necessary jurisdiction, to exercise promptly that jurisdiction when an offender is present, to investigate, and to submit the matter to prosecution or extradite.¹⁰¹

The Most-Favored-Nation Clause

⁹⁵ See Murphy, *supra* note 2, at 174–76.

⁹⁶ 2013 Report, *supra* note 1, at 125, Annex A.

⁹⁷ *Id.* at 132, para. 18.

⁹⁸ *Id.* at 132–33, para. 20.

⁹⁹ Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (July 20, 2012), available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

¹⁰⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

¹⁰¹ 2013 Report, *supra* note 1, at 134–39, paras. 21–36.

Since its inception in 2008, the topic on “the most-favored-nation clause” has been addressed within a study group.¹⁰² That group was reconstituted for the sixty-fifth session under the chairmanship of Donald M. McRae (Canada), although Mathias Forteau (France) served as chair in McRae’s absence.¹⁰³ The study group considered working papers by Shinya Murase (Japan) and Mahmoud Hmoud (Jordan), as well as two recent arbitration awards that considered the “*Maffezini* problem” of whether MFN clauses allow for importation of dispute resolution provisions from other treaties.¹⁰⁴ It is expected that the study group will begin consideration of a draft final report at the Commission’s session in 2014, which will address the following issues: the origins and purpose of the work of the study group; the Commission’s 1978 draft articles on MFN clauses and their relevance; subsequent developments since 1978; the contemporary relevance of MFN clauses; the consideration of MFN provisions in bodies such as UNCTAD and OECD; contextual considerations, such as the application of MFN clauses before “mixed” (investor/state) arbitrations; and conflicting approaches to the interpretation of the MFN provisions in the case law.¹⁰⁵ The study group report might include guidelines or model clauses, but might instead simply analyze state practice regarding the writing of MFN clauses and the interpretation that tribunals have given those various provisions.¹⁰⁶

Protection of the environment in relation to armed conflicts

¹⁰² See Murphy, *supra* note 2, at 176–77.

¹⁰³ 2013 Report, *supra* note 1, at 110, para. 152.

¹⁰⁴ *Id.* at 112–13, paras. 160–62.

¹⁰⁵ *Id.* at 113, para. 163.

¹⁰⁶ *Id.* at 114, para. 164.

During its sixty-third session, the Commission added the topic “protection of the environment in relation to armed conflicts” to the long-term work program.¹⁰⁷ During the sixty-fifth session, the Commission moved the topic to its current program of work and appointed Marie Jacobsson (Sweden) as the special rapporteur.¹⁰⁸ Jacobsson then held informal consultations regarding the scope, methodology, and possible final outcome of the Commission’s work on the topic in preparation for the development of her first report.¹⁰⁹

Jacobsson has in mind three stages for the project which might be characterized as “temporal” in nature. A first report in 2014 will address the obligations of states in the pre-conflict period with respect to protection of the environment (such as inclusion of relevant materials in military manuals), as well as “peacetime” obligations that may remain relevant in times of armed conflict. A second report in 2015 will address relevant obligations that arise under the law of armed conflict, both international and non-international. A third report in 2016 will address obligations that may exist in the post-conflict period, such as with respect to reparations or reconstruction.¹¹⁰ To assist in these reports, the Commission has requested information from States “on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict.”¹¹¹ The final product of this project is not yet clear, but the special rapporteur has in mind the development of non-binding draft guidelines.¹¹²

Protection of the Atmosphere

¹⁰⁷ Report of the International Law Commission on the Work of Its Sixty-Third Session, U.N. GAOR, 63d Sess., Supp. No. 10, at 287, para. 365 (2011).

¹⁰⁸ 2013 Report, *supra* note 1, at 105, para. 131.

¹⁰⁹ *Id.* at 105, para. 132.

¹¹⁰ *Id.* at 106, paras. 139–41.

¹¹¹ *Id.* at 8, para. 28.

¹¹² *Id.* at 106–07, para. 143.

On the final day of the sixty-fifth session, the Commission decided to move the topic “protection of the atmosphere” from the long-term to the current work program, and to appoint Shinya Murase (Japan) as special rapporteur.¹¹³ Concern that the Commission’s work on the topic not address matters that could have adverse effects either for existing treaty regimes or for ongoing negotiations resulted in a decision by the Commission that the topic would be significantly limited in scope. That decision provided:

(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights;

(b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to “fill” gaps in the treaty regimes;

(c) Questions relating to outer space, including its delimitation, are not part of the topic;

¹¹³ *Id.* at 6, para. 22.

(d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

The Special Rapporteur's reports would be based on such understanding.¹¹⁴

Murase will now proceed to develop his first report on the topic, which may be informed by draft articles and commentary by an International Law Association Committee on "The Legal Principles Relating to Climate Change," which is scheduled to complete its work (under the chairmanship of Murase) in 2014.¹¹⁵

Other Issues

In the course of the sixty-fifth session, the Commission added the topic crimes against humanity to its long-term work program.¹¹⁶ The objective in pursuing that topic would be to draft a convention addressing the obligation of a state party to criminalize crimes against humanity under its national laws and to exercise jurisdiction over offenders who turn up in its territory, even when the crime is committed abroad by and against non-nationals. Further, unlike the Rome Statute for the International Criminal Court,¹¹⁷ the convention would address inter-state obligations with respect to the crime, including *aut dedere aut judicare* and the provision of

¹¹⁴ *Id.* at 115.

¹¹⁵ The Committee's reports and other information may be found at <http://www.ila-hq.org/en/committees/index.cfm/cid/1029>.

¹¹⁶ 2013 Report, *supra* note 1, at 115–16, paras. 169–70. at 140, Annex B.

¹¹⁷ Rome Statute for the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

mutual legal assistance.¹¹⁸ Crimes against humanity thus joins several topics on the Commission's long-term work program.¹¹⁹

¹¹⁸ 2013 Report, *supra* note 1, at 140–48, Annex B.

¹¹⁹ Murphy, *supra* note 2, at 177.